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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

WALTER S. COHEN, et al.,

Petitioners

v.

CAROLYN CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTION PRESENTED

Does a mentally retarded person, involuntarily committed to a state institution, have a substantive constitutional right to have the state pay for her care at a private "community living arrangement," where her treating professionals recommend such a placement as the best way to improve her skills, but where it is not neccessary to ensure her physical safety, keep her free from bodily restraints, or prevent the deterioration of the skills she already possesses, and there is no disagreement that institutionalization is preferable to no services at all?

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No.
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PETITION FOR A WRIT OF CERTIORARI

Walter S. Cohen, Secretary of the Pennsylvania Department of Public Welfare, together with Jennifer L. Howse, Russell Rice, and S. Reeves Power, subordinate officials in the same Department, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

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[1]The petitioners were the appellants in the court of appeals, and the respondent, Carolyn Clark, was the

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a) is reported at 794 F.2d 79. The opinion of the district court (Pet. App. 97a) is reported at 614 F. Supp. 686. The district court's opinion incorporates by reference the parties' stipulation of facts, which is not reported and is reproduced at Pet. App. 221a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 26, 1986, and this petition was filed within 90

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appellee. The following additional parties were also appellees in the court of appeals, but did not actively participate in the proceedings: Richard C. Surles, C. Everett Cornman, Centralized Comprehensive Human Services, Inc., James F. Wood, Scott McBride and Florence Kirshheimer.

days thereafter, on September 23, 1986. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

1. In 1956, a Pennsylvania court committed Carolyn Clark to the Laurelton Center, a state institution for the mentally retarded. In 1984, she brought this action seeking, among other relief, an injunction requiring state officials to transfer her to a private "community living arrangement" and to pay for her care there. Her claims are said to arise under the Due Process Clause of the Fourteenth Amendment and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the district court therefore had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Clark filed her complaint and later requested a preliminary injunction. After a two-day hearing, the district court consolidated proceedings on preliminary and permanent injunctive

relief, and issued a permanent injunction granting the relief requested. The petitioners appealed to the Court of Appeals for the Third Circuit, which affirmed the district court.

2. Carolyn Clark is a mildly retarded individual born in 1941. Pet. App. 221a, 250a.[2] She is a legal resident of Philadelphia, Pennsylvania. Pet. App. 221a. Her early family life was, in the district court's words, "tempestuous and disruptive to her development." Pet. App. 99a. She was sexually abused, exploited, and neglected, C.A. App. 532a, 542a, and by the age of 15 had been arrested several

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[2]The designation "C.A. App." refers to the Appendix filed in this case in the Court of Appeals. "Pet. App." refers to the Appendix to this Petition.

times on various charges. C.A. App. 537a. In June of 1956, when she was 15, Clark was in state custody in a Youth Study Center. C.A. App. 544a.

In 1956, there were no such things as group homes or community living arrangements for the mentally retarded; for a young girl such as Clark, there were few alternatives to institutionalization. C.A. App. 155a, 225a. Those that existed were explored without success. Clark's family, to whom she might have returned, was uncooperative with social services agencies. C.A. App. 158a. For a time, Clark was placed with a foster mother, but that placement ended when she was picked up in a park at 4:30 in the morning with four boys. C.A. App. 544a.

Clark was examined by a psychiatrist, who found her to be "childish and dependent...weak, pliable, submissive, an easy sex victim of unscrupulous persons...incapable of anything like adequate judgment." C.A. App. 538a. She was examined likewise by a psychologist, who found that she "tends to react impulsively with but limited capacity to judge the adequacy of her behavior....She is poorly equipped to handle daily environmental stresses or to act judiciously. Institutionalization may have a stabilizing effect on her personality." C.A. App. 539a. Both examiners recommended institutionalization.

In November of 1956, the Department of Public Welfare filed a petition for commitment in the Philadelphia Court of Common Pleas. C.A. App. 397a. The petition included the results of the psychiatric and psychological examinations, C.A. App. 402a, and it was granted.[3] Clark was committed to the Laurelton State School and Hospital, now known as Laurelton Center. Pet. App. 246a.

Clark would remain at Laurelton Center until 1985, when the district court in this case ordered her transfer

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[3]The district court found that Clark had not received notice or a hearing on this commitment, Pet. App. 99a. The petitioners contend that this finding is unsupported by any evidence and is therefore clearly erroneous. Since the district court ultimately found that the 1956 commitment proceeding was not unconstitutional, however, the petitioners were not prejudiced by this erroneous finding.

to a private facility. During that time, there was no judicial review of the continued appropriateness of her commitment. Pet. App. 247a. There were, however, periodic professional reviews by the interdisciplinary treatment team responsible for Clark's care at Laurelton Center. C.A. App. 259a-260a, 262a, 428a-530a.

These professional reviews took the form of an annual written assessment of Clark's status by each member of her treatment team.[4] They described, often

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[4]The most recent package of such reports, done in December of 1984, is included in its entirely in the record. The package includes 10 separate reports: rehabilitative education, residential services, speech and hearing, recreation, social services, nutrition, psychology, vocational services, medicine, and nursing. C.A. App. 437a-472a.

in minute detail, Clark's strengths, weaknesses, needs, progress and capabilities from their various perspectives. These written reports, and the results of a treatment team conference, were then summarized in an Individual Habilitation Plan (IHP), which specifically addressed the resident's suitability for, and needs upon, discharge. C.A. App. 259a-260a, 428a-436a, 473a-490a, 499a-510a, 517a-525a. The resident, family and friends were invited to participate in formulating this Plan. E.g., C.A App. 436a. This annual review was supplemented by less elaborate monthly and quarterly reviews of the resident's status. C.A. App. 259a.

Clark's treating professionals repeatedly concluded that she continued to be in need of care and treatment. At no time did her treatment team recommend that she simply be discharged, and at no time would that have been appropriate. C.A. App. 263a.

Beginning at least in 1976, however, the treatment team concluded that Clark's needs could best be met outside of Laurelton Center, in a community-based residential setting, and recommended that she be placed in a "community living arrangement" designed to provide the services she would continue to need. Pet. App. 252a.[5]

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[5]The community living arrangement contemplated by the experts who testified for Clark was a house located in a residential neighborhood in Philadelphia, operated by a private organization; and occupied by three mentally

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Clark herself wants to live in such a setting. C.A. App. 172a-173a. Beginning in at least 1976, the staff at Laurelton Center repeatedly attempted to obtain a community placement for Clark, without success. Pet. App. 252a, 253a-264a, 271a, 276a; C.A. App. 263a, 404a-405a, 410a-412a, 414a-415a, 422a-425a. Neither Laurelton Center nor the Department of Public Welfare as a whole directly provides any community living arrangements. C.A. App. 264a, 270a. Furthermore, while the Commonwealth,

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retarded residents plus a husband-and-wife team serving as the resident staff. Clark would also be enrolled in a day school to develop her skills in shopping, cooking, and so forth, and to train her for employment. She would, however, be free to come and go as she pleased, free "to walk around the community, go shopping at whatever time, to set [her] own schedule, to plan what [she] want[s] to do." C.A. App. 144a, 227a-36a.

through the Department of Public Welfare, is the ultimate source of payment for such services, again, it does not provide those funds directly.

Rather, funds for community living arrangements are funneled through the county mental retardation programs established pursuant to Pennsylvania's Mental Health and Mental Retardation Act. Within a county, state officials play no role in allocating funds to pay for services for a specific individual. It is the county's responsibility to decide, among the prospective recipients, which will receive the available community placements. C.A. App. 271a.

Accordingly, it was Philadelphia County that had the power, and was requested by state officials, to find a community placement for Clark. As stated

above, those efforts were unsuccessful.

In the meantime, Clark continued to receive care and treatment at Laurelton Center. She "plateaued out" at Laurelton; that is, she absorbed most of the skills and adaptive behaviors the Center could give her, and continuing her stay there would have resulted in little further progress. C.A. App. 223a, 266a. On the other hand, her continued stay permitted her to maintain the achievement level she had already reached. Her own expert conceded that there had been no deterioration in her independent living skills, and that none was to be expected, C.A. App. 168a-169a; and the district court specifically found that there had been no deterioration in her adaptive behavior. Pet. App. 144a.

In recent years, the treatment team at Laurelton Center explicitly addressed the appropriateness of Clark's staying on at the Center, in light of both the continuing unavailability of a community placement and of her continuing need for care and treatment. The consensus of the treatment team was that "until such placement can be secured, [Clark] will continue to benefit from the services provided at Laurelton Center. Laurelton Center remains the most appropriate and least restrictive alternative available to [Clark] at this time." C.A. App. 434a, 488a. Clark produced no evidence, and indeed made no allegation, that this assessment was incorrect. Laurelton Center therefore continued to provide her with services in accordance with the habilitation plan designed by the treatment team.

3. The district court found that this state of affairs violated Clark's procedural and substantive due process rights. The district court rejected Clark's Section 504 claim and rejected likewise the claim that her initial commitment to Laurelton had violated procedural due process. Pet. App. 124a-155a, 158a-164a.[6]

The district court held, however, that her continuing detention at Laurelton had triggered a need for further procedural safeguards, which had not been provided. Pet. App. 164a-182a. The district court strongly suggested, but found it unnecessary to hold, that due process required an adversary hearing before a judicial

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[6]The court of appeals affirmed these holdings. Pet. App. 25a, n.3, 32a-33a.

officer, Pet. App. 166a-167a, and expressly rejected the idea that the periodic reviews conducted by Clark's treatment team satisfied due process. Pet. App. 167a-176a. In the district court's view, these reviews were a "meaningless exercise" because their recommendation that Clark be provided with a community living arrangement had not been implemented. Pet. App. 176a.

The district court then turned to substantive due process, and held that, given the recommendations of her treatment team, Clark had a constitutional entitlement to placement in a community living arrangement. Pet. App. 191a-206a. The district court therefore issued an injunction ordering the appropriate local officials to develop

such a placement, and ordering the defendant state officials to use state funds to pay for it. Pet. App. 217a-220a.[7]

4. On appeal by the state officials, the Third Circuit affirmed. Judge Gibbons, writing for himself and Judge Sloviter, held that the failure to provide Clark with a community living arrangement had violated "her substantive liberty right to appropriate treatment under [Youngberg v.]Romeo[, 457 U.S. 307 (1982)]," Pet. App. 37a, and her right to procedural due process as well. Pet. App. 35a. He likewise held that, to the extent that the district court's injunction was intended to compensate Clark for past injuries, as opposed to present constitutional

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[7]The district court did not resolve Clark's claim for damages.

violations, it would not violate the Eleventh Amendment. Pet. App. 19a-24a.

Judge Becker concurred. He disagreed with the majority on the Eleventh Amendment issue, believing that "if Ms. Clark is entitled to [a community living arrangement], it must be because she has a present constitutional entitlement to it, independent of any mistreatment she suffered in the past." Pet. App. 63a (emphasis in original). Judge Becker, extrapolating from the right to treatment articulated in Youngberg, argued for what he called the "modified non-deterioration principle," which he described as follows: "involuntarily civilly committed persons have a right to treatment sufficient to develop their self-care skills to at least the level

at which they would be if the persons had not been institutionalized." Pet. App. 87a. Relying on the district court's remark that, had she not been institutionalized, Clark "most likely" could have lived an "average life," Pet. App. 215a, Judge Becker concluded that substantive due process entitled Clark to placement in a community living arrangement until she acquired the skills she would have learned had she not been institutionalized. Pet. App. 95a-96a.

REASONS FOR GRANTING THE WRIT

The petitioners ask the Court to review the Court of Appeals' holding that a mentally retarded person has a constitutional entitlement to be provided with a community living arrangement. This is an unresolved constitutional issue of great public importance; and the Court of Appeals' erroneous decision directly conflicts with the holdings of two other Courts of Appeal.

A. THIS CASE PRESENTS AN UNRESOLVED CONSTITUTIONAL ISSUE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF PUBLIC PROGRAMS FOR THE MENTALLY RETARDED.

In Youngberg v. Romeo, 457 U.S. 307 (1982), this Court addressed for the first time the substantive rights of the institutionalized mentally retarded. The Court held that the mentally

retarded plaintiff in Youngberg enjoyed constitutionally protected interests in "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Id., at 324. The Court emphasized, however, the limited nature of its holding, id., at 319, and emphasized as well its preference for "incremental decision-making" in this novel area. Id., at 319 n. 25, quoting Romeo v. Youngberg, 644 F.2d 147, 183 (3d Cir. 1980)(Aldisert, J., dissenting). The Court therefore did not address the "difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se," id., at 318, nor did the Court say whether, or to what extent, a right

to training would exist for mentally retarded persons whose circumstances differed from those of the Youngberg plaintiff. Id., at 319 (holding limited to the circumstances and record presented); at 325 (Blackmun, J., concurring)(difficult and important issues left unresolved).

This case presents the question of whether Youngberg compels the state to extend a right to training in a setting where the factual circumstances and the relief sought differ markedly from those in Youngberg. Nicholas Romeo, the plaintiff in Youngberg, was a profoundly retarded man who conceded that no amount of training would make possible his release from the state institution where he lived, id., at 309, 317. He required training simply to allow him to live, within the institution, in reasonable safety and in reasonable freedom from

bodily restraints, id., at 317-18, and he sought to establish his right to receive that training in the institution.

Carolyn Clark on the other hand, is a mildly retarded woman who, with the proper training, could eventually lead a semi-independent life with minimal support services, Pet. App. 107a-108a. She does not, however, require training to ensure her physical safety or freedom from physical restraints, C.A. App. 257a-58a. She seeks, not to improve conditions within the institution, but to establish an entitlement to training outside the institution altogether.

The Court of Appeals held that states are constitutionally required to provide the mentally retarded whatever optimal services the treating professionals recommend, and are constitutionally barred from offering anything

less.[8] Cost is not a legitimate consideration, nor may the states consider

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[8]The courts below approached this case as if it involved two distinct claims: procedural due process and substantive due process. In reality, the procedural due process holding is entirely dependent on the substantive due process holding, and rises or falls with it.

The courts below began their analyses by addressing the procedural due process rights of a mentally retarded person facing involuntary commitment. Applying the Court's decision in Parham v. J.R.,442 J.S. 584 (1979), they correctly concluded that Clark's initial commitment was procedurally sound. Pet. App. 32a, 158a. They then turned to the question of what, if any, further procedural safeguards were required for a person, like Clark, committed for an indefinite period.

The petitioners conceded that Clark's continuing detention implicated a protected liberty interest, and further conceded that, in the case of an indefinite commitment, due process required at least the opportunity for some sort of periodic review of its continuing appropriateness. The question then, of course, was the familiar one of "what process is due?"

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the competing demands of others. In the Third Circuit's view, it must be all or

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At this point, the courts below shifted their ground. Abandoning the question of what process was due to protect Clark from erroneous detention--which they never did resolve--they focused instead on the issue of a community living arrangement. The professional reviews of Clark's status had concluded that, while institutionalization was better than release, a community living arrangement would be better still; and the courts below held that the failure to provide such a placement made the review a "meaningless exercise" that violated procedural due process. Pet. App. 176a, 34a-35a.

The right to procedural due process only exists, of course, where there is some substantive interest for it to protect, and the holding below--purportedly resting on procedural grounds--makes sense only if there exists some substantive entitlement on Clark's part to be provided with a community living arrangement. The courts below found such an entitlement in the due process clause. Pet. App. 37a, 199a. This holding is the keystone of the case; if it falls, the procedural holding falls with it.

nothing; there is no place for reasonable, if imperfect, compromises.

In this case, that constitutional principle required Pennsylvania to move Clark from an institutional setting to a community-based living arrangement because her treating professionals determined that she would benefit from such a move. As recently as December of 1982, there were nearly 125,000 mentally retarded persons residing in state-operated institutions similar to the one in which respondent lived. Statistical Abstract of the United States, 1986, 106th ed. It is generally accepted that most mentally retarded persons "would be better off" in community based facilities than in institutional placements. Boyd, Strategies in Zoning and Community Living Arrangement for Retarded Citizens:

Parens Patriae Meets Police Power, 25 Villanova L. Rev. 273, 274 (1980). Thus, the constitutional principle established by the Third Circuit in this case theoretically requires each of the states to create and provide community-based living arrangements for most, if not all, of the mentally retarded persons who are now residing in state-operated institutions.

Thus viewed, the effects of this holding on the ability of states to design and fund programs for the mentally retarded, and others, are as predictable as they are undesirable. Some states may acquiesce, giving the mentally retarded a preferred position in the allocation of funds at the expense of other, equally deserving,

programs.[9] Some may pressure their treating professionals to trim their recommendations to fit their budgets. Some may simply stop providing for the mentally retarded altogether. The importance of this issue to public mental retardation programs cannot be overstated. The issue in Youngberg--where the Court granted review "because of the importance of the question," 457 U.S. at 314--was the manner in which states would be required to operate the

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[9] Ironically, Clark herself was the victim of just such a well-intentioned judicial effort to help the mentally retarded. The district court found that the petitioners were "struggling" to provide court-ordered placements for the Pennhurst plaintiffs, to the point where no money was available to create placements for others, such as Clark. Pet App. 120a, 241a. See Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977)(subsequent history omitted).

institutions they had chosen to establish; the issue here is whether states, having established such institutions, are constitutionally obligated to pay for other services as well. The effects of such an obligation for other areas can only be conjectured. If the mentally retarded have a substantive constitutional right to services, even when not institutionalized, it is difficult to see why the mentally ill, the physically ill and the disadvantaged generally do not have similar entitlements.

B. THE COURT OF APPEALS ERRONEOUSLY APPLIED THIS COURT'S DECISON IN YOUNGBERG V. ROMEO TO CREATE A RIGHT TO TRAINING IN A COMMUNITY LIVING ARRANGEMENT.

The Court of Appeals held that Clark enjoys a substantive liberty interest in having the state pay for

her mental retardation services outside of a state institution. The court based this holding upon the testimony of the treating professionals and other experts, and upon its reading of Youngberg v. Romeo, supra. Pet. App. 35a-37a.

In Youngberg, this Court held that a mentally retarded person, involuntarily committed to a state institution, retains protected liberty interests in food, shelter, clothing, and medical care; in conditions of reasonable safety; in freedom from unreasonable bodily restraints; and in such training as may be required by these interests. 457 U.S. at 324. The Court emphasized that, "[i]n determining whether the state has met its obligations in these respects, decisions made by the appropriate professionals

are entitled to a presumption of correctness." Ibid.

In this case, the district court found that all of the professionals agreed that Clark ought to be receiving services in a non-institutional setting, and found that such a setting would be less restrictive than Laurelton Center. Pointing out that in Youngberg, this Court required deference to the judgment of treating professionals, the district court reasoned that the failure to provide such services violated the Fourteenth Amendment, Pet. App. 199a, and the Court of Appeals agreed. Pet App. 37a. This analysis, while superficially appealing, is fundamentally flawed.

The Court of Appeals' first error was to extend Youngberg outside of the

institutional setting in which it arose. In Youngberg, this Court started its analysis from the "established principle" that "[a]s a general matter, a state is under no constitutional duty to provide substantive services to those within its border." 457 U.S. at 317. It is only when a person is "institutionalized--and wholly dependent on the State," that there arises a constitutional duty to provide services, for it is only then that the failure to provide services can constitute a "deprivation" by the state within the meaning of the Fourteenth Amendment. Ibid.

To divorce the duty to provide services from the fact of institutionalization--to say, as the Court of Appeals said, that the state has an affirmative duty to provide services outside of an institution--is to cut Youngberg loose

from its constitutional moorings, and to turn the Fourteenth Amendment into a general entitlement program for the mentally retarded, and perhaps others was well.

Judge Becker, in his concurrence, recognized and attempted to avoid this problem by positing that "Clark is still involuntarily committed even while at the CLA....[She] cannot leave the CLA permanently without permission, and...she is not free to enjoy all lawful activities." Pet. App. 91a. There is no support in the record for this supposition. To the contrary, the community living arrangement designed for Clark is an open facility, privately operated, in which "there's no such thing as going AWOL," C.A. App. 144a, and in which Clark is free to do "all those things that normal people do in the community." C.A. App. 235a. Clark,

as the majority opinion recognized, has been released from the custody of the state, Pet. App. 13a; and the state has no authority to compel her to remain in a community living arrangement. There is thus no sense in which she is "institutionalized--and wholly dependent on the state" within the meaning of Youngberg.

The Court of Appeals' second error was to ignore Youngberg's teaching that any right to training must be rooted in an "identifiable liberty interest," in favor of a general constitutional right to receive whatever services are recommended by the treating professionals. Where, as here, there is professional unanimity on what constitutes the optimal course of training, the Court of Appeals held that it is a deprivation of due process for the state to fail to provide that training.

This is erroneous. Even as applied to services within an institution, Youngberg cannot be read so broadly. Under Youngberg, services are constitutionally mandated not when professionals recommend them, but when they are necessary to effectuate "identifiable liberty interests." 457 U.S. at 319, n. 25. The Court specifically said that the "imposition of any affirmative duty on a State" must be supported by a "constitutional predicate," ibid.

Thus, the respondent in Youngberg, who had a liberty interest in freedom from unnecessary bodily restraints, had a right to "minimally adequate" training to reduce the aggressive behavior that occasioned those restraints. 457 U.S. at 322. Professional judgment entered the picture, not as the source of the entitlement to services, but as the measure of their minimal adequacy once

they were identified against the touchstone of an "identifiable liberty interest."

None of the liberty interests identified in Youngberg or elsewhere are implicated in this case. Clark had a liberty interest in remaining free from unreasonable bodily restraints, but there was no finding that she was so restrained; to the contrary, Clark had the freedom of the grounds at Laurelton Center, and the freedom to leave the grounds as well. C.A. App. 257a-258a. She had a liberty interest in reasonably safe conditions, but there was no finding, and indeed no allegation, that she required training to effectuate this right.

Nor was there any danger that, by remaining at Laurelton Center, Clark would lose any of the skills she already had. See Youngberg, 457 U.S. at 327-29

(Blackmun, J., concurring)(mentally retarded may have constitutional right not to regress while in state custody). Her own expert conceded, and the district court found, that there had been no deterioration in her self-care skills, and that none was to be expected. C.A. App. 168a-169a; Pet. App. 114a.

It cannot be said, then, that Clark was denied any services required by an "identifiable liberty interest," for no such interest was established. Even if such an interest had been identified, however, the Court of Appeals' analysis would still be flawed by its failure to appropriately address the services required by it.

Under Youngberg, it is clear that the Constitution requires a state to provide only those services that are

"minimally adequate" to serve an identified liberty interest, 457 U.S. at 322; and that "decisions made by the appropriate professionals are entitled to a presumption of correctness," 457 U.S. at 324, which is rebutted only when those decisions reflect a "substantial departure from accepted professional judgment." 457 U.S. at 323. In this case, however, the district court made no finding that the services received by Clark fell outside the range of possible professional judgment; and the record refutes any suggestion that Clark's care was not based upon professional judgment. C.A. App. 434a (treatment team's opinion that Clark would continue to benefit from placement at Laurelton Center, which was the "most appropriate and least restrictive setting" available); C.A. App. 488a (same). See

generally C.A. App. 428a-530a (treatment teams' assessments, 1981-84).

Rather, the district court and the Court of Appeals relied on the fact that all of the professionals agreed that placement in a non-institutional setting would be the best thing for Clark. Pet. App. 199a. This was an error. It is one thing to identify an optimal course of treatment; it is another thing entirely to say that some alternative course is outside the bounds of acceptable practice.

The Court of Appeals also relied heavily on the district court's remark that, had she never been institutionalized in the first place, Clark could "most likely" have lived an "average life." Pet. App. 16a, 87a, 215a. The district court in turn relied on the testimony of a psychologist called by

Clark, who gave it as his opinion that, absent institutionalization, Clark would today be a "normally-functioning individual in her community." C.A. App. 138a. The significance of this point is not clear[10] --the district court held that Clark's initial institutionalization had not deprived her of due process, Pet. App. 158a, and the Court of Appeals affirmed, Pet. App. 32a--but it is clear that, in making it, the courts below failed to accord the deference required by Youngberg to the decisions of treating professionals.

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[10]Except for Judge Becker's concurrence. Judge Becker would have held that Clark was constitutionally entitled to whatever training would enable her to match the achievements she would have attained had she never been committed. Pet. App. 87a. This point is therefore critical to Judge Becker's theory of the case.

Clark's initial commitment was supported by the recommendations of a psychiatrist and a psychologist, both of whom had examined her and who concluded that, in the absence of institutionalization, she would continue to be sexually abused, exploited and neglected; that she was incapable of handling the daily stresses of what the district court calls an "average life"; and that institutionalization might have a stabilizing effect. C.A. App. 538a-39a. Under Youngberg, these assessments were entitled to a "presumption of correctness," 457 U.S. at 324, that is not overcome merely because a plaintiff can find an expert who is willing to testify, 30 years later, that he disagrees with them.

To summarize: in Youngberg the Court held only that mentally retarded persons have a constitutional right,

when they are institutionalized, to receive minimally adequate services that are necessary in light of specific liberty interests. In contrast, the Court of Appeals has required Pennsylvania to provide an optimal plan of services, not tied to any identifiable liberty interest, and to do so outside of an institution. This goes far beyond anything contemplated by Youngberg, is constitutionally untenable, and should be reversed.

C. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS.

The Third Circuit's holding, that the failure to provide Clark with a community living arrangement violated her Youngberg right to training, directly conflicts with the holding of the Second Circuit in Society for Good

Will to Retarded Children v. Cuomo, 737 F.2d 1239 (1984), and with the Seventh Circuit's holding in Phillips v. Thompson, 715 F.2d 365 (1983).[11]

Society for Good Will, supra, was a class action brought on behalf of all the residents of a state institution in New York. As in this case, "[a]ll experts, both defendants' and plaintiffs', agreed that many [residents] could be safer, happier and more productive outside the institution in small community residences. Their professional judgment was that transfers should be made as soon as the facilities could be made available." Id., 737 F.2d at 1248, quoting 572 F. Supp. at 1347. As in this case, the district court

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[11]Judge Becker, in his concurrence, recognized this conflict, Pet. App. 89a., n. 12. The majority opinion does not mention these cases.

concluded that "[t]he Constitution mandates community placement" for those residents and ordered the state to provide them. Ibid.

On appeal, the Second Circuit reversed. The court held that "no...resident is deprived of freedom from undue restraint or any other constitutional right merely because he or she lives at [a state institution].... [M]ere residence in an institution or school for the mentally retarded, without more, does not violate due process." Id., 737 F.2d at 1247. The court expressly rejected the idea, embraced by the Third Circuit in this case, that there exists a constitutional right to whatever training the professionals agree would be best. "Even if every expert testifying at trial agrees that another type of treatment or residence setting might be better, the

federal courts may only decide whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice." Since, as in this case, there was no evidence to support such a finding, the Second Circuit reversed.

Phillips v. Thompson, supra, was also a class action on behalf of mildly and moderately retarded residents of a state institution. Like Clark, they were not subjected to bodily restraints; their movements were limited only by the "reasonable requirements of caring for a large number of handicapped people in an institutional setting." Id., 715 F.2d at 368. Like Clark, they required no training to ensure their physical safety or freedom from restraint. Ibid. Like Clark, however, they complained that their very residence in the institution

unduly restricted them and deprived them of appropriate training, and they asked that Illinois be ordered to provide them with community placements.

The Seventh Circuit rejected this claim. Relying on this Court's statement in Youngberg that, "[a]s a general matter, a state is under no constitutional duty to provide substantive services," the court of appeals held that there is no "substantive due process right under the fourteenth amendment to care in a community residential setting." Id., 715 F.2d at 367. The court also held that the residents had not been unduly restrained or deprived of any right to training recognized in Youngberg. Id., 715 F.2d at 368.

The holdings in these two cases cannot be reconciled with the Third Circuit's holding in this case. In

addition, these two class actions underscore the importance of the constitutional issue in this case by demonstrating the frequency with which it arises.[12] Contrary to the district court's assertion that this case presents "extraordinary facts," Pet App. 206a, n. 15, Clark's situation--in which a state provides imperfect services in preference to no services at all--is,

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[12]It arose also in the lengthy Pennhurst litigation, another class action which twice reached this Court. Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977)(finding right to community living arrangements on federal statutory, state statutory and federal constitutional grounds), aff'd in part and rev'd in part, 612 F.2d 84 (3d Cir. 1979)(reaching federal statute only), rev'd, 451 U.S. 1 (1981), on remand, 673 F.2d 647 (3d Cir. 1982)(reaching state statute only), rev'd, 465 U.S. 89 (1984), settlement approved, 610 F. Supp. 1221 (E.D. Pa. 1985). The constitutional issue was thus never resolved.

in a world of limited resources, all too common.

The Second and Seventh Circuits have heeded this Court's admonition that, in their effort to cope with the complex problem of mental retardation, the states should not be forced to "choose between attacking every aspect of a problem or not attacking the problem at all." Youngberg, 475 U.S. at 317, quoting Dandridge v. Williams, 397 U.S. 471, 486-87 (1970). The Third Circuit has not. This Court should therefore resolve the conflict among the circuits on this important issue.

CONCLUSION

For the foregoing reasons, the petitioners request the Court to issue a writ of certiorari to review the judgment of the court of appeals, and then reverse that judgment.

Respectfully submitted,

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